

# Fordham Law Review

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Volume 52 | Issue 3

Article 3

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1983

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### Recommended Citation

John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 Fordham L. Rev. 350 (1983).  
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## Thoughts on Extraterritorial Application of the United States Antitrust Laws

### Cover Page Footnote

The author acknowledges with gratitude the assistance of Carol A. Corcoran, his colleague at Milbank, Tweed, Hadley & McCloy, in the preparation of this Article.

# THOUGHTS ON EXTRATERRITORIAL APPLICATION OF THE UNITED STATES ANTITRUST LAWS

JOHN H. SHENEFIELD\*

## INTRODUCTION

**I**N the world of international affairs, events sometimes move with kaleidoscopic speed, and a year may be a very long time. The rules governing the transnational application of national competition laws are a case in point.

Two short years ago, if an antitrust practitioner had been asked for a realistic assessment of the prospects for successful resolution of conflicts arising from the application of United States antitrust laws to foreign commerce, the response would have been relatively sanguine—at least in comparison with what would have been justified several years earlier. The United States seemed well into an era of new sensitivity to foreign concerns in antitrust enforcement, and the opportunity for dealing with conflicts amicably, constructively, and without overreaction was viewed as particularly propitious.<sup>1</sup>

Exemplifying this trend, the Department of Justice through two successive administrations indicated it would make a strong effort to discharge its international responsibilities fairly and expeditiously, with sensitivity to the justifiable concerns of other nations over impingements on their sovereignty.<sup>2</sup> United States involvement in the Organization for Economic Cooperation and Development (OECD)

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1. See Remarks by John H. Shenefield, Associate Attorney General, *Extraterritoriality and Antitrust—New Variations on a Familiar Theme*, Before the International Law Institute and the International Law Section of the ABA 21 (Dec. 10, 1980).

2. See Remarks by William Baxter, Assistant Attorney General, Antitrust Division, *Antitrust in an Interdependent World*, Before the ABA International Law Section, International Trade Committee of ABA Antitrust Section, Japan Society, International Division of D.C. Bar and Georgetown University Law Center, International Law Institute 4-5 (Sept. 29, 1981); Remarks by John H. Shenefield, *supra* note 1, at 19-21; Remarks by William French Smith, Attorney General, at the Twenty-Ninth Congress of Union Internationale des Avocats 15 (Aug. 31, 1981).

offered a new mechanism for resolution of antitrust disputes.<sup>3</sup> In a similar vein, the State Department sought to expand the practice of prior notice to, and consultation and cooperation with, foreign governments when United States regulatory enforcement or investigative actions raised the danger of confrontations with foreign concerns.<sup>4</sup> The United States and Australia signed, after lengthy negotiations, a creative and perhaps quite useful antitrust agreement.<sup>5</sup> Other similar agreements were under consideration.<sup>6</sup> Finally, in a flurry of congressional activity, legislation to clarify the jurisdictional reach of the Sherman Act and the Federal Trade Commission (FTC) Act to foreign commerce was in the works.<sup>7</sup> It could fairly be said that prospects for avoiding serious disputes were improving, and all that was needed to finish the job was continued effort, careful attention to the procedures, some help from the courts in doctrinal refinements—and good will and good luck.

This seemingly optimistic scenario was abruptly shattered by President Reagan's announcement on June 18, 1982, that sanctions against the transfer of oil and gas equipment to the Soviet Union for the construction of the Trans-Siberian pipeline would be expanded to reach the transactions of foreign subsidiaries of United States corporations and foreign licensees of United States technology.<sup>8</sup> Our European allies reacted with sharp and impassioned indignation to the broad jurisdictional reach asserted by the United States in these export control regulations.<sup>9</sup> In a protest delivered to the Department of State

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3. See OECD, Recommendation of the Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. C(79)154 (1979); OECD, Concentration and Competition Policy (1979). In the view of Assistant Attorney General Baxter, the notification and consultation procedures set forth in the OECD recommendations would help "to avoid misunderstanding and allay foreign concerns." *Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 13 (1981) (statement of Assistant Attorney General William Baxter).

4. See Remarks by Davis R. Robinson, Legal Adviser of the Department of State, *Economic Regulation and International Jurisdictional Conflict*, at Columbia University (June 30, 1982), reprinted in Dep't St. Bull., Oct. 1982, at 35.

5. Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, United States-Australia, T.I.A.S. No. 10,365, reprinted in [July-Dec.] *Antitrust & Trade Reg. Rep.* (BNA) No. 1071, at 36 (July 1, 1982).

6. See Griffin, *Foreign Governmental Reactions and Assertions of Jurisdiction*, in *Advanced International Antitrust Practice and Related Trade Issues* 13-16 (outline prepared for World Trade Institute Workshop, May 20-21, 1982).

7. This legislation was enacted near the end of 1982 as Title IV of the Export Trading Company Act of 1982, Pub. L. No. 97-290, § 402, 96 Stat. 1233, 1246 (1982) (codified at 15 U.S.C. §§ 6a, 45(a) (1982)).

8. Export of Oil and Gas Equipment to the Soviet Union, Statement on Extension of U.S. Sanctions, 18 Weekly Comp. Pres. Doc. 820 (June 18, 1982).

9. See Legal Serv. of the Comm'n of the European Communities, *European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R.*, reprinted in 21 Int'l Legal Materials 891 (1982).

and the Department of Commerce,<sup>10</sup> they condemned the United States action as an infringement of their territorial sovereignty, counter to internationally accepted principles of jurisdiction and international law, and inconsistent with the understanding purportedly reached at the Versailles Summit. As a further step, individual European countries quickly moved to retaliate by invoking protective statutes designed to block compliance by their nationals with United States Department of Commerce orders.<sup>11</sup> The Department, in turn, was quick to impose administrative penalties on those companies that failed to abide by the United States ban.<sup>12</sup>

Confrontations resulting from the pipeline sanctions ultimately were resolved politically. But this recent manifestation of United States "territorial imperialism" is not forgotten overseas; long-term damage has been done. In fact, the incident has contributed to a perception among Europeans that the most effective posture in resisting any United States claims to extraterritorial jurisdiction is to be strong and aggressive, because reasonableness in this case was unavailing.<sup>13</sup> This climate of heightened suspicion has tainted the relationships between governments and made the task of United States anti-trust enforcement even more difficult.

The recent confrontation with United Kingdom authorities over the *Laker Airways* litigation<sup>14</sup> is a vivid example of an investigation into the alleged anticompetitive conduct of foreign firms that has encountered heavy weather because of the strained relations between the United States and some of its major trading partners. Sir Michael Havers, the United Kingdom's Attorney General, was prompted to comment:

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10. N.Y. Times, Aug. 13, 1982, at 1, col. 3.

11. On July 22, 1982, the government of France, relying on a little-used requisition order, issued a direct mailing compelling all French companies to honor pipeline-related contracts with the Soviet Union. See N.Y. Times, Aug. 24, 1982, at D1, col. 3; N.Y. Times, July 23, 1982, at A1, col. 6. On August 3, 1982, acting pursuant to the Protection of Trading Interests Act, 1980, ch. 11, reprinted in [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 959, at F-1 (April 10, 1980), the British government ordered four British companies with the largest pipeline contracts not to comply with the U.S. embargo. United Kingdom: Statement and Order Concerning the American Export Embargo with Regard to the Soviet Gas Pipeline (Aug. 2, 1982), reprinted in 21 Int'l Legal Materials 851 (1982); see N.Y. Times, Aug. 3, 1982, at A1, col. 2.

12. 47 Fed. Reg. 44,603 (Oct. 8, 1982) (AEG-Kanis sanctions); *id.* at 40,205 (Sept. 13, 1982) (John Brown Engineering sanctions); *id.* at 39,709 (Sept. 9, 1982) (Nuovo Pignone sanctions); *id.* at 38,170 (Aug. 30, 1982) (as amended by 47 Fed. Reg. 39,708 (Sept. 9, 1982) (Dresser sanctions)).

13. See N.Y. Times, Aug. 17, 1983, at D1, col. 3.

14. *Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124 (D.D.C. 1983); *British Airways Bd. v. Laker Airways Ltd.*, [1983] 3 W.L.R. 544 (Q.B., C.A. 1983).

There is a deep sense of anger in Great Britain and Europe about the pipeline debacle and a deep sense of dismay over the actions of the United States Justice Department in setting up a grand jury investigation of the Laker collapse . . . American extensions of jurisdiction have been inching forward, and I think it is a very dangerous development.<sup>15</sup>

The complexity and interdependence of the world in which both foreign and American businesses will increasingly be forced to function are not likely to diminish. Yet the goal of formulating a comprehensive framework that is sensitive to the concerns of foreign governments and at the same time ensures consistency and effectiveness in the enforcement of United States antitrust laws continues to prove elusive.

Consider the following scenario: A charge is made that a number of competing firms have acted in violation of United States antitrust laws to drive a foreign company out of the market by colluding to fix prices and to pressure lenders to withdraw financing. A private civil suit seeking treble damages is filed in a United States district court. The conspiracy is alleged to have occurred in the United States, the plaintiff is a foreign corporation, and the defendants are both foreign and domestic. Inspired by the civil suit, the Department of Justice begins a grand jury investigation into the alleged price-fixing. Foreign defendants seek relief in court abroad, trying to enjoin the plaintiff's United States suit. Diplomatic discussions are initiated in an effort to head off the United States investigations. Negotiations break down, and a foreign government formally intervenes, issuing an order that effectively bans any documents or information within that country from being made available for proceedings in the United States. An impasse has been reached, and the United States court is now required to decide how to proceed.

Ideally, such a scenario should present little difficulty. In brief, the court should first inquire whether it has personal jurisdiction over the parties. The judge should then determine whether the alleged anti-competitive conduct has the "direct, substantial and reasonably foreseeable effect" on United States commerce necessary to support jurisdiction over the subject matter of the claim.<sup>16</sup> Finally, in the interests of comity and reasonableness, the court should engage in a balancing exercise, weighing competing domestic and foreign interests to assess whether exercise of jurisdiction would be appropriate.<sup>17</sup> Unfortunately, the flaws in this three-step approach begin to emerge almost as

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15. N.Y. Times, Aug. 17, 1983, at D1, col. 3, D2, col. 5.

16. 15 U.S.C. §§ 6a(1), 45(a)(3) (1982); accord U.S. Dep't of Justice, Guide on Antitrust and International Operations 7 (1977).

17. See *infra* pt. II(B)(2).

soon as the threshold inquiry into personal jurisdiction is begun, and the courts find themselves caught in a muscle-flexing imbroglio that they are ill-equipped to resolve.

This Article identifies some of the differences between United States and foreign antitrust regimes that are at the root of the tension pervading extraterritorial antitrust enforcement. It then examines the historical development of the American concept of extraterritorial antitrust jurisdiction and the impact on that concept of the Export Trading Company Act of 1982.<sup>18</sup> Finally, possible means of reducing international tension without sacrificing the United States' interest in adequate antitrust enforcement are proposed.

### I. SOURCES OF CONFLICT WITH UNITED STATES ANTITRUST LAWS

At one level, the controversy concerns jurisdictional concepts—the inevitable conflict between expansive American notions of transnational or extraterritorial application of United States law, and the far more conservative territorial concepts, exemplified by the British view. At another level, the controversy is one of conflicting economic regimes—the confident reliance on competition reflected in the assertive application of United States antitrust law, against the more regulatory regimes of other major industrial countries.

Conflicts over jurisdiction and slights to sovereign states, imagined or real, are serious. But the crux of the controversy is found in the contrast—even conflict—among the choices different nations make in setting their national economic priorities. If all trading nations shared an identical perception of the role competition should play in an economic framework, it is hard to imagine that the same degree of indignation would be triggered by jurisdictional conflicts, or that legal disputes would be so difficult to resolve.

It is the different organizing principles that countries apply to their economies that fuel the controversy. It is irritating in the extreme to develop the perception that one's own nation's choice is jeopardized, even negated, by choices made in favor of other policies by other governments far away. The widespread alarm in many countries caused by these acts of "economic imperialism," whether they be the formation of commodity cartels or the application of antitrust laws to forestall the cartels' effects,<sup>19</sup> frequently transmutes the jurisdictional controversies into bitter contests of will between nations.

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18. Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified at scattered sections of 12 and 15 U.S.C.).

19. See, e.g., *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980); *United States v. AMAX, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,467 (N.D. Ill. 1977); *United States v. Korean Hair Goods Ass'n of Am.*, 1976-1 Trade Cas. (CCH) ¶ 60,773 (S.D.N.Y. 1976).

If the enforcement of law reflecting contrasting economic policy choices helps create conflict, it must also be noted that the manner in which that law is applied exacerbates the situation. Procedural contrasts between the United States and other antitrust regimes include sharp differences in discovery procedures and the existence of criminal remedies. Perhaps even more infuriating to foreign governments is the prominence in the United States of the treble damage remedy and incentives to private plaintiffs' lawyers provided by attorney's fee awards and contingent fee agreements.

Foreign discovery procedures are generally narrowly tailored to issues directly involved in the litigation.<sup>20</sup> By contrast, more liberal American discovery procedures permit inquiry into a wide range of matters that may never receive the direct attention of a foreign court.<sup>21</sup> Indeed, it is at this early stage in an investigation or litigation that conflicting legal regimes increasingly tend to collide. The impasse reached by United States government attorneys and Swiss authorities in the recent tax evasion investigation and ensuing indictment of Marc Rich illustrates this trend.<sup>22</sup> The blocking actions of United Kingdom authorities in response to the United States government's investigation of the alleged antitrust conspiracy in the *Laker* case provide further illustrations.<sup>23</sup> Finally, the objection raised by Australian officials against the Justice Department's investigation of foreign shipping companies engaged in meat exports from Australia to the United States<sup>24</sup> is another indication that discovery procedures are a principal source of conflict.

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20. See 2 J. Atwood & K. Brewster, *Antitrust and American Business Abroad* § 15.10 (1981); Carter, *Existing Rules and Procedures*, 13 Int'l Law. 5, 5-6 (1979).

21. See *United States v. Proctor & Gamble*, 356 U.S. 677, 682 (1958); *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 999 (10th Cir. 1977). The concern with what were perceived to be Department of Justice "fishing expeditions" was a fundamental element in the decision of the House of Lords to limit discovery of British nationals in connection with the *Uranium* litigation. See *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] 1 All E.R. 434, 437 (H.L. 1977).

22. See *Wall Street J.*, Sept. 21, 1983, at 4, col. 1.

23. On January 21, 1983, British Airways filed a declaratory judgment and injunctive relief action against Laker Airways in the Queen's Bench Division of the High Court of Justice in England seeking to prevent Laker from continuing with its suit against British Airways in the United States. See *Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124, 1127 (D.D.C. 1983); *British Airways Bd. v. Laker Airways Ltd.*, [1983] 3 W.L.R. 544, 549 (Q.B. 1983). The British Court granted the relief sought, *British Airways Bd. v. Laker Airways Ltd.*, [1983] 3 W.L.R. 544, 591 (C.A. 1983), and immediately thereafter similarly successful suits were filed by British Caledonian, Lufthansa, and Swissair. See *Laker Airways*, 559 F. Supp. at 1127.

24. See *Associated Container Transp. (Australia) Ltd. v. United States*, 705 F.2d 53, 56-57 (2d Cir. 1983).



While other countries have criminal provisions in their antitrust laws,<sup>25</sup> in general they are far less severe than United States provisions, and they rarely apply to individuals. The possibility of substantial fines and even of jail, however, are facts of life that a United States corporation and its individual officers, contemplating conduct that may be an antitrust violation, are forced to confront. To foreigners, this aspect of United States antitrust law is a puzzling aberration and a major source of irritation.

By far the most objectionable aspect of United States antitrust procedure from the perspective of foreign governments is the private treble damage remedy. This feature is without parallel in the antitrust regimes of other countries. The unique role that private attorneys are actively encouraged to play in our antitrust enforcement system is anathema to foreigners. Indeed, the most bitter controversies in international antitrust in recent years have come not in the government cases in which a sensitivity to concerns of foreign governments has tempered antitrust enforcement policy, but in private cases in which the plaintiffs are understandably largely unconcerned with the reactions of foreign governments. Lord Denning, the Master of the Rolls, has succinctly, while not entirely diplomatically, expressed the British frustration with the allure that the American legal system has for private plaintiffs: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."<sup>26</sup>

## II. THE UNITED STATES PERSPECTIVE AND THE 1982 LEGISLATION

The task of addressing foreign concerns is complicated by the fact that United States antitrust policymakers must also confront the many American business people who continue to express serious concern and uncertainty about the application of antitrust laws to their activities abroad. These business people suggest that the United States' expansive notions of antitrust law enforcement put United States firms at a substantial disadvantage vis-a-vis foreign competitors not similarly encumbered.<sup>27</sup>

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25. See Juell-Sundbye & Lett, *Denmark* § 4.03[3][b], in B3 World Law of Competition (J. von Kalinowski gen. ed. 1981); Kaiser, *Canada* § 3.03, in A3 *id.*; Plaisant & Joris, *France* § 4.03[3][c], in B3 *id.*; Stockmann & Strauch, *Federal Republic of Germany* § 23.03[1], in B5 *id.*

26. *Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124, 1133 n.37 (D.D.C. 1983) (quoting Transcript of proceedings, Feb. 4, 1983, at 6).

27. See National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General 393-401 (1979) (Separate Views of Senator Jacob K. Javits); Schwechter & Schepard, *The Effects of United States Antitrust Laws on the International Operations of American Firms*, 1 Nw. J. Int'l L. & Bus. 492, 494-97 (1979).

These perceptions are more illusory than real.<sup>28</sup> For example, perhaps the most common concern of United States business is that research joint ventures, common among foreign firms engaged in major commercial projects, are likely to subject American participants to antitrust attack.<sup>29</sup> Substantive United States antitrust law, however, does not discourage such joint venture activities, but rather encourages them. It has been settled law for many years in this country that joint ventures that create competition by permitting entities to engage in projects that would otherwise be impossible or infeasible are not violations of the antitrust laws.<sup>30</sup> Indeed, the Antitrust Division has not challenged a research joint venture in over 25 years.

Even though these perceptions are more myth than analysis, they nevertheless have had a practical political effect on Congress,<sup>31</sup> leading to the enactment of the Export Trading Company Act in October of 1982.<sup>32</sup> The Act, designed to promote the formation of export trading companies (ETCs) and to increase United States exports of goods and services, is made up of four separate and independent titles. Two of these titles specifically address the formation of ETCs,<sup>33</sup> and therefore will have little impact on the jurisdiction controversy. The other two titles, the antitrust provisions of Title III<sup>34</sup> and Title IV,<sup>35</sup> apply to all types of export activity.

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28. *A Bill to Establish a Commission on the International Application of Anti-trust Laws: Hearings on S. 432 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 142 (1981) (statement of John H. Shenefield); *Foreign Trade Anti-trust Improvements Act: Hearings on S. 795 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 12 (1981) (statement of William Baxter, Assistant Attorney General); Ongman, *Is Somebody Crying "Wolf"? An Assessment of Whether Antitrust Impedes Export Trade*, 1 Nw. J. Int'l L. & Bus. 163 (1979).

29. See H.R. Rep. No. 686, 97th Cong., 2d Sess. 4 (1982); H.R. Rep. No. 637, 97th Cong., 2d Sess. [pt. 2] 9 (1982).

30. See *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912). The manufacturing joint venture of General Motors and Toyota, recently approved by the FTC, is another example of this enforcement policy. See *Wall St. J.*, Dec. 23, 1983, at 3, col. 2.

31. See H.R. Rep. No. 686, 97th Cong., 2d Sess. 15 (1982) (purpose of Export Trading Company Act of 1982 is to alleviate apprehensions of business regarding effect of antitrust enforcement on exports). In any administration, amending the antitrust laws is one of the easy—and cheap—ways of supporting announced policies, whether export enhancement, encouragement of research and development, fashioning a new industrial policy, or whatever becomes the chic policy prescription of tomorrow.

32. Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified in scattered sections of 12 and 15 U.S.C.).

33. *Id.* §§ 101-104, 201-207, 96 Stat. at 1233-40 (codified at 15 U.S.C. §§ 4001-4003 (1982) and scattered sections of 12 U.S.C.).

34. 15 U.S.C. §§ 4011-4021 (1982).

35. *Id.* §§ 6a, 45(a)(3).

### A. Title III Certification Provisions

Under Title III, anyone, including but not limited to ETCs, can apply to the Department of Commerce for a certificate of review.<sup>36</sup> A certificate grants the holder a limited immunity from all federal and state antitrust laws for export activity specified in the certificate.<sup>37</sup> Export conduct is certified only if the Commerce and Justice Departments concur that the proposed conduct conforms to the standards articulated in Title III.<sup>38</sup> A holder of a certificate is protected from suit on criminal or civil antitrust charges by any government authority or private plaintiff challenging conduct covered by that document, but can be sued by private parties for violating the standards.<sup>39</sup> There is considerable disincentive for the private litigant to sue under Title III, however, because recovery is limited to single damages.<sup>40</sup> Moreover, the plaintiff will be required to pay the defendant's attorneys' fees if the suit is unsuccessful.<sup>41</sup>

The extent to which these provisions will serve as an effective stimulus to United States exports or affect antitrust enforcement activity has yet to be determined. Some critics are quite skeptical about the certification process, criticizing it as cumbersome and suggesting that the costs and risks, as well as doubts about the extent to which certification provides any meaningful protection to exporters, easily

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36. *Id.* § 4012(a).

37. *Id.* § 4016; see Bruce & Pierce, *Understanding the Export Trading Company Act and Using (or Avoiding) its Antitrust Exemptions*, 38 Bus. Law. 975, 976 (1983).

38. 15 U.S.C. § 4013 (1982). The standards require that the conduct in question:

(1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant,

(2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant,

(3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant, and

(4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the applicant.

*Id.* § 4013(a).

39. *Id.* § 4016. Conduct that complies with a certificate is presumed to comply with the substantive standards of Title IV. *Id.* § 4016(b)(3).

40. See *id.* § 4016(b)(1). A suit by the government predicated on conduct that violates these standards is limited to injunctive relief, and then only if the conduct sought to be enjoined threatens "clear and irreparable harm to the national interest." *Id.* § 4016(b)(5).

41. *Id.* § 4016(b)(4).

outweigh the questionable benefits that its use may provide.<sup>42</sup> The procedure requires companies to disclose sensitive information to the government, with undesirable expenditures of time and money, and it may not be flexible enough for a company that must face unforeseen market changes. Moreover, Title III requires the expenditure of limited resources by the antitrust enforcement agencies. It is the latest in a succession of laws requiring reports, letters, clearances, and the like, that is fast converting the Antitrust Division to a regulatory agency for which clearances, not prosecution, are the order of the day.

#### B. *Title IV—The Foreign Trade Antitrust Improvements Act*

Another reason for the guarded prognosis about Title III is that Title IV, the Foreign Trade Antitrust Improvements Act of 1982, provides an exemption from the antitrust laws that, in many ways, is broader than that authorized by Title III's certification procedures. Originally introduced in the House of Representatives as a counterproposal to the Senate-initiated Export Trading Company legislation, Title IV was hastily tacked on to the ETC Act in the last days of the session to ensure its successful passage by both houses.<sup>43</sup> The main purpose of this Title's amendments was to codify the jurisdictional reach of the Sherman and FTC Acts to exclude from these laws conduct that has no "direct, substantial, and reasonably foreseeable effect" on United States domestic commerce, import commerce or the export opportunities of a United States national.<sup>44</sup>

Codification of a uniform standard for determining the jurisdictional reach of the antitrust laws was intended merely to reduce the possibility of inconsistent results and to promote certainty in business planning.<sup>45</sup> It was intended to clarify, not to change, the prevailing judicial standard.<sup>46</sup> Therefore, to assess the full measure of the legislation's impact, it is necessary to retrace the development of United States jurisdictional theory from its earliest point.

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42. Bruce & Pierce, *supra* note 37, at 1014; Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 Fordham L. Rev. 201, 218 (1982).

43. See Legal Times, Oct. 11, 1982, at 1, col. 3.

44. 15 U.S.C. §§ 6a(1), 45(a)(3)(A) (1982). Curiously, the Clayton Act, 15 U.S.C. §§ 12-27 (1982), and the Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (1982), are unaffected by the legislation. The forerunner of Title IV approved by the House of Representatives would have amended section 7 of the Clayton Act to exempt joint ventures "limited to commerce, other than import commerce, with foreign nations." H.R. 5235, 97th Cong., 2d Sess. § 3, 128 Cong. Rec. H4980 (daily ed. Aug. 3, 1982). Representative McClory attributed the deletion of this provision from the compromise bill eventually signed into law "more to our hurried conference negotiations than to insuperable substantive objections on the part of the Senate." 128 Cong. Rec. H8463 (daily ed. Oct. 1, 1982).

45. H.R. Rep. No. 686, 97th Cong., 2d Sess. 5-6 (1982).

46. See *id.*

## 1. The Early Cases

Each of the antitrust statutes encompasses some form of jurisdiction over international commerce. The Sherman Act expansively prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . with foreign nations."<sup>47</sup> Both the Clayton<sup>48</sup> and FTC<sup>49</sup> Acts define the scope of their application to embrace commerce with foreign nations.

The legislative history of the Sherman Act suggests that Congress was exercising its full power under the Commerce Clause<sup>50</sup> to reach beyond the borders of the United States, both to regulate import commerce and to prevent circumvention of the statute's proscriptions by the relocation of antitrust conspiracies abroad.<sup>51</sup> To what extent Congress attempted to reach conduct abroad by foreigners, and how that goal was to be juxtaposed with the traditional deference one nation displays in applying its laws to the citizens of another nation, were from the start complex questions for both judges and commentators.

The Supreme Court first addressed antitrust extraterritoriality in 1909 in *American Banana Co. v. United Fruit Co.*<sup>52</sup> American Banana, in its suit for treble damages under the Sherman Act, alleged that its plantation had been destroyed as a result of confiscation by the Costa Rican government acting at the instigation of United Fruit.<sup>53</sup> The confiscation was alleged to be part of United Fruit's anticompetitive scheme to monopolize and restrain banana imports from Central America into the United States.<sup>54</sup> Justice Holmes flatly rejected this claim, holding that because the seized plantation was within the de facto jurisdiction of Costa Rica and the injury complained of had occurred outside the United States, United Fruit's scheme was beyond the jurisdictional reach of the Sherman Act.<sup>55</sup> The Court held further

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47. 15 U.S.C. § 1 (1982); *see id.* § 2.

48. *Id.* § 12.

49. *Id.* § 44.

50. U.S. Const. art. I, § 8, cl. 3.

51. 21 Cong. Rec. 1766 (1890); *see* *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944); B. Hawk, *United States, Common Market and International Antitrust: A Comparative Guide* 22 n.11 (1979); Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 Colum. L. Rev. 1247, 1249 n.11 (1977). *But see* Simson, *The Return of American Banana: A Contemporary Perspective on American Antitrust Abroad*, 9 J. Int'l L. & Econ. 233, 239 (1974) (Sherman Act jurisdiction over foreign commerce more limited than Commerce Clause power).

52. 213 U.S. 347 (1909).

53. *Id.* at 349, 354-55.

54. *Id.* at 354.

55. *Id.* at 357-58.

that seizures by Costa Rican soldiers were acts of a foreign sovereign, the validity of which could not be challenged.<sup>56</sup> The Court sidestepped the issue whether the decision would have been different if the activity in question had been found to have an effect on United States commerce.

Over the course of the next thirty-six years, courts struggled to find ways to circumvent *American Banana's* holding and sought to fit foreign activities into categories that would permit United States courts to find territorial jurisdiction under United States antitrust laws. The case was not so much overruled as it was steadily eroded by the courts.<sup>57</sup> Early efforts to distinguish *American Banana* were modest, most involving conspiracies that were implemented or furthered, at least in part, in the United States. It was not until 1945 that the Second Circuit, sitting as the court of last resort in the landmark case of *United States v. Aluminum Co. of America (Alcoa)*,<sup>58</sup> was forced to deal with the harder question of anticompetitive conduct occurring entirely outside the United States.

If *American Banana* represented the most conservative approach of United States courts to the reach of the antitrust laws, the *Alcoa* decision expressed the most expansive view. *Alcoa* involved a cartel of Canadian and European aluminum producers, formed overseas, that imposed a quota on its members' production, including imports into the United States market.<sup>59</sup> In holding the Sherman Act applicable to the acts of Alcoa's independent Canadian subsidiary, Judge Learned Hand asserted it was settled law "that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."<sup>60</sup> Therefore, the Sherman Act could apply to agreements and concerted conduct, even among foreigners in foreign countries, "if [these agreements] were intended to affect imports and did affect them."<sup>61</sup> Applying this "effects" test, Judge Hand in *Alcoa* found intent in the cartel's explicit inclusion of imports into the United States. The requisite effects were then presumed and the burden of

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56. *Id.* at 358.

57. See, e.g., *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927); *United States v. Pacific & A. Ry. & Navigation Co.*, 228 U.S. 87, 105-06 (1913); *American Tobacco Co. v. United States*, 221 U.S. 106, 184 (1911). Although the *American Banana* decision has never been expressly overruled, "its authority has been so eroded by subsequent case law as to have been effectively limited to its specific factual pattern." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1181 (E.D. Pa. 1980).

58. 148 F.2d 416 (2d Cir. 1945).

59. *Id.* at 422.

60. *Id.* at 443.

61. *Id.* at 444.

proof shifted to the defendant to come forward with evidence to the contrary.<sup>62</sup>

*Alcoa's* "effects" test was controversial from the start. Sometimes criticized on the grounds that it was inconsistent with public international law, or because it made more likely conflict between United States antitrust laws and contrasting economic systems of other countries, or because it failed to give adequate consideration to principles of comity,<sup>63</sup> the test nevertheless displayed a surprising resiliency.

## 2. *Timberlane's* Moderation of the "Effects" Test

*Alcoa* essentially imposed a bright-line test, leaving little room for flexibility with respect to competing claims to jurisdiction by other nations. Many foreign governments subscribe to a "nationality" principle of jurisdiction, asserting a primary right to regulate conduct of their nationals.<sup>64</sup> Foreign governments also claim the primary right, under the "territorial" principle of jurisdiction, to regulate conduct within their own territory, regardless of what effects may be produced by such conduct elsewhere.<sup>65</sup> *Alcoa* failed to provide even a hint of a framework for addressing conflicts between these principles and the "effects" test of jurisdiction.

Even before the enactment of Title IV, dissatisfaction with this state of affairs prompted a number of intermediate federal courts to temper the *Alcoa* formulation. In *Timberlane Lumber Co. v. Bank of America*,<sup>66</sup> the plaintiff alleged that its operations in Honduras had been paralyzed by the attachment of its properties in an Honduran judicial proceeding initiated by the defendants as part of a conspiracy

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62. *Id.*

63. See B. Hawk, *supra* note 51, at 30-35; Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 Yale L.J. 639 (1954); Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 1957 Brit. Y.B. Int'l L. 146; Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 Cornell Int'l L.J. 195 (1978). Foreign criticism of this "effects" approach has prompted several nations to pass defensive laws to defeat the enforcement of United States laws against their citizens. See, e.g., Foreign Antitrust Judgments (Restriction of Enforcement) Act, 1979 Austl. Acts 142 (Australia); Protection of Trading Interests Act, 1980, ch. 11, reprinted in [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 959, at F-1 (April 10, 1980) (United Kingdom); Law Relating to the Communication of Economic, Commercial, Industrial or Financial or Technical Documents or Information to Foreign Natural or Legal Persons, 1980 J.O. 1799, 1980 B.L.D. 285 (France) (English translation at 75 Am. J. Int'l L. 382 (1981)); see also Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 Stan. J. Int'l Stud. 247 (1982).

64. See Restatement (Revised) of Foreign Relations Law of the United States § 402(2) (Tent. Draft No. 2, 1981).

65. See *id.* § 402(1)(a).

66. 549 F.2d 597 (9th Cir. 1976).

to force Timberlane out of the Honduran lumber export business.<sup>67</sup> The defendants countered Timberlane's claim by asserting an act of state defense.<sup>68</sup>

The Ninth Circuit rejected the application of the act of state doctrine because the judicial proceedings in Honduras had been instituted by a private litigant, there had been no move by the plaintiff to challenge any Honduran policy or to name Honduras or any of the officers involved in the attachment as co-conspirators, and the adjudication of the antitrust claim would in no way threaten relations between United States and Honduras.<sup>69</sup> On the question of jurisdiction, the Ninth Circuit suggested substituting a tripartite inquiry for the *Alcoa* test.<sup>70</sup> First, the trial court should decide whether there was some effect on United States commerce. Second, the court should determine whether the restraint of trade issue was of a type or magnitude cognizable as a violation of United States antitrust law. Third, the court should consider whether to abstain from exercising its jurisdiction for reasons of comity. This would be decided by balancing, among other things, the interest of and contacts with the United States against the interests of other nations.<sup>71</sup>

*Timberlane* was significant for reformulating the test for United States jurisdiction under the antitrust laws, and also for introducing the concept of abstention under this jurisdictional rule of reason. Moreover, it offered a mechanism that permitted emphasis on strong antitrust enforcement to be reconciled with a sensitivity to the legitimate foreign state concerns regarding intrusions on their sovereignty.

In *Mannington Mills, Inc. v. Congoleum Corp.*,<sup>72</sup> a United States corporation charged that a United States competitor had fraudulently secured patents from foreign governments as part of a scheme to gain a competitive advantage in violation of the United States antitrust laws.<sup>73</sup> In the spirit of *Timberlane*, the Third Circuit listed ten specific

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67. *Id.* at 604-05.

68. *Id.* at 605.

69. *Id.* at 608.

70. *Id.* at 613.

71. *Id.* at 614. Factors to be weighed include:

the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations of principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

*Id.*

72. 595 F.2d 1287 (3d Cir. 1979).

73. *Id.* at 1290.



factors to be considered in balancing United States and foreign government interests.<sup>74</sup> The Fifth and Tenth Circuits have also endorsed the *Timberlane-Mannington Mills* balancing approach;<sup>75</sup> indeed, the Tenth Circuit became the first court to use this approach to dismiss a case,<sup>76</sup> thus demonstrating concretely that in appropriate cases United States courts are capable of deferring to predominant foreign interests.

### 3. Title IV and its Aftermath

The drafters of Title IV were not primarily concerned with the hostile reactions of foreigners opposed to the expansive jurisdictional reach that the "effects" doctrine arguably provides to United States antitrust laws. Rather, their thrust was to free United States businesses from excessive antitrust regulation of their conduct in export markets and overseas ventures, both by correcting perceptions that antitrust laws inhibit export joint ventures and by codifying a more normative jurisdictional standard that courts could more easily apply.<sup>77</sup> Because this Congressional focus essentially ignored the extraterritorial conflict, Title IV's usefulness in that context is limited.

Several issues of earlier uncertainty, however, are resolved by Title IV. The debate among antitrust commentators concerning subject matter jurisdiction over conduct affecting wholly foreign commerce is resolved in favor of denying jurisdiction. In such cases, private litigants have no right to recover damages under the Sherman Act, and the FTC and Justice Department are barred from bringing a civil or criminal action to protect foreign interests.<sup>78</sup> This will not significantly affect actions brought by the government because enforcement officials have assumed for years that they had to meet the "foreseeable effects" test before filing enforcement actions.<sup>79</sup> In private actions,

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74. *Id.* at 1297-98.

75. *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884-85 & n.7 (5th Cir. 1982), *vacated on other grounds*, 103 S. Ct. 1244 (1983); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 869-70 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982).

76. *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 871 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982).

77. H.R. Rep. No. 686, 97th Cong., 2d Sess. 2 (1982); *see* Bruce & Pierce, *supra* note 37, at 983. *See generally* Ongman, "Be No Longer Chaos": Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope, 71 Nw. U.L. Rev. 733 (1977).

78. *See* 15 U.S.C. §§ 6a(1), 45(a)(3) (1982).

79. *See* U.S. Dep't of Justice, Guide on Antitrust and International Operations 7 (1977).

however, Title IV may permit conduct previously considered unlawful.<sup>80</sup>

Similarly, Title IV may exempt conduct of United States exporters from the antitrust laws. In several recent cases initiated by foreign plaintiffs, the requisite effect on United States commerce was found because United States exporters were foreclosed by the defendant's conduct.<sup>81</sup> The statute makes clear that only United States exporters that suffer injury are entitled to complain.<sup>82</sup> Therefore, although a domestic firm or the government could maintain an action in this situation, a foreign competitor would be precluded from bringing an antitrust action.<sup>83</sup>

Title IV also exempts conduct if the effects are de minimis,<sup>84</sup> or if the effect is not one that the antitrust laws were designed to prevent.<sup>85</sup> Antitrust jurisdiction, therefore, cannot be based on a beneficial effect, nor on an effect that is less than "substantial."

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80. See *Pacific Seafarers, Inc. v. Pacific Far E. Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969); H.R. Rep. No. 686, 97th Cong., 2d Sess. 9 (1982). The defendants in *Pacific Seafarers* were American corporations, members of two related shipping conferences, engaged in carrying cargo between Taiwan and South Vietnam. The purchase of the cargo was financed by the United States government through the Agency for International Development (AID), which, as a condition to the financing, required that the cargo be shipped aboard American-flag vessels. The plaintiffs, United States corporations operating American-flag vessels manned by American crews, attempted entry into the Taiwan/South Vietnam AID-financed shipping market. By using older vessels and operating exclusively in this market, the plaintiffs sought a competitive advantage over the defendants. Allegedly, the defendants, by excluding the plaintiffs from membership in the shipping conferences and, when that failed, by predatory pricing, forced the plaintiffs out of business. The court held that these facts supported Sherman Act jurisdiction. *Id.* at 811.

The House Report refers to *Pacific Seafarers* and states: "A transaction between two foreign firms, even if American owned, should not, *merely by virtue of the American ownership*, come within the reach of our antitrust laws." H.R. Rep. No. 686, 97th Cong., 2d Sess. 9 (1982) (emphasis added).

81. See, e.g., *Waldbaum v. Worldvision Enters., Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,378 (S.D.N.Y. 1978); *Industria Siciliana Asfalti Bitumi, S.p.A. v. Exxon Research & Eng'g Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y. 1977); *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 383 F. Supp. 586 (E.D. Pa. 1974).

82. 15 U.S.C. §§ 6a(1)(B), 45(a)(3)(A)(ii) (1982); see H.R. Rep. No. 686, 97th Cong., 2d Sess. 14 (1982).

83. See H.R. Rep. No. 686, 97th Cong., 2d Sess. 9-10 (1982). Although the foreclosure does constitute a "direct, substantial, and reasonably foreseeable effect . . . on export trade . . . of a person engaged in such trade . . . in the United States," the injury to the foreign competitor is not cognizable because it is not "injury to export business in the United States." 15 U.S.C. §§ 6a(1), 45(a)(3)(A) (1982).

84. H.R. Rep. No. 686, 97th Cong., 2d Sess. 5-6 (1982).

85. *Id.* at 11; see *National Bank of Can. v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981); *A.G.S. Elecs., Ltd. v. B.S.R. (U.S.A.), Ltd.*, 460 F. Supp. 707 (S.D.N.Y.), *aff'd mem.*, 591 F.2d 1329 (2d Cir. 1978).

Although Title IV has clarified some issues, it is important not to expect too much from these amendments. The standard set forth is not necessarily any clearer than, or indeed much different from, the standard that existed prior to its passage. Moreover, it still remains to be interpreted by the courts.

In addition, most of the conflict between the United States and foreign countries over antitrust applicability grows out of foreign conduct and international cartels allegedly having an effect on United States imports or domestic commerce and not out of the export conduct of United States nationals. The 1982 legislation provides little basis for optimism that conflicts in this area will lessen.<sup>86</sup>

Indeed, it is possible that the Act itself may in some ways serve as a means of exacerbating the conflict. If the certification process of the ETC Act is utilized by United States exporters with any degree of frequency, foreign countries may see this development as a threat to the stability of their domestic markets and may begin to enforce their own antitrust laws in a more aggressive and protectionistic way.<sup>87</sup> Another potential source of conflict is the more aggressive posture displayed toward United States antitrust enforcement actions by foreign governments in the enactment of blocking statutes.<sup>88</sup> Growing involvement of foreign states in commercial activities, either as protectors of basic raw materials or vital national interests, or as co-entrepreneurs, is likely to be yet another source of conflict.

### III. THE CONTINUING PROBLEM

The seriousness of the conflicts and the failure of existing mechanisms to resolve them continue to require attention. In this context, the *Timberlane-Mannington Mills* balancing approach, while it needs to be developed and refined, attains new stature. In efforts to minimize international friction, the courts must be receptive to appearances by representatives of foreign governments to make known their points of view. In addition, foreign parties to the litigation, as well as their governments, must be willing to appear.

There was a mutual failure to satisfy these conditions in the recent *Uranium* antitrust litigation.<sup>89</sup> The foreign defendants in that case did not appear at trial and default judgments were entered. The trial

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86. The House Report indicated that Title IV was not intended to affect antitrust enforcement against international cartels. See H.R. Rep. No. 686, 97th Cong., 2d Sess. 13 (1982).

87. See Griffin, *supra* note 6, at 7-13.

88. See *supra* notes 11, 63 and accompanying text.

89. *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980).

judge relied on the *Alcoa* test, expressing his frustration with the *Timberlane* approach:

Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable in this case. The competing interests here display an irreconcilable conflict on precisely the same plane of national policy.<sup>90</sup>

The Seventh Circuit affirmed the trial judge, not only disregarding the arguments presented by foreign governments on behalf of the defendants, but also admonishing those governments for appearing.<sup>91</sup>

The *Uranium* experience illustrates a number of points. First, private treble damage actions have a special tendency to produce controversy, chiefly because the plaintiffs have neither the incentive nor the obligation to consider the sensitivities of foreign governments that might be offended by the litigation.<sup>92</sup> Second, foreign governments should be encouraged to appear in United States courts and to do so without fear of censure or ridicule. Third, while the *Uranium* trial judge may have exaggerated the difficulty of the *Timberlane* balancing test as well as the limitations of the judiciary in being able to apply it, he was correct in suggesting that not every court will be able to discern or balance the relevant competing national interests or to assess the impact of its prospective actions on foreign nationals in every case.

The recent rapid escalation of conflicting judicial orders in the *Laker* litigation,<sup>93</sup> both from United States and United Kingdom courts, serves as a further illustration of these ongoing difficulties and demonstrates the risk of an outcome similar in its disastrous conse-

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90. *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979), *aff'd in part, reversed in part on other grounds*, 617 F.2d 1248 (7th Cir. 1980).

91. In expressing its disapproval, the court stated: "Wholly owned subsidiaries of several defaulters have challenged the appropriateness of the injunctions, and *shockingly to us*, the governments of the defaulters have subversively presented for them their case against the exercise of jurisdiction." 617 F.2d at 1256 (emphasis added) (footnote omitted).

92. The tendency of private treble damage suits to produce controversy was particularly evident to this author in his official capacity at the Department of Justice Antitrust Division in the context of an earlier grand jury investigation in the *Uranium* litigation, which was concluded when it was decided that prosecution of the foreign company would not be appropriate. See Letter from Robert B. Owen, Legal Advisor of the Department of State, to John H. Shenefield, Associate Attorney General (Mar. 17, 1980) (transmitted to the Seventh Circuit at the request of the Legal Advisor), *reprinted in* 74 Am. J. Int'l L. 665, 665-67 (1980).

93. See *Laker Airways, Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124 (D.D.C. 1983); *British Airways Bd. v. Laker Airways Ltd.*, 3 W.L.R. 544 (Q.B., C.A. 1983).

quences to the *Uranium* case. The backdrop against which the *Laker* case unfolds is far from simple. For years, United States policy toward international aviation was consistent with, if not identical to, the aviation policies of other nations. Bilateral agreements limiting the number of carriers on international routes<sup>94</sup> and the multilateral rate coordination of the International Air Transport Association (IATA)<sup>95</sup> functioned predictably and anticompetitively under an exemption from the United States antitrust laws.<sup>96</sup> More recently, after the Civil Aeronautics Board (CAB) effectively banned United States airlines from participating in IATA,<sup>97</sup> the airlines discussed Atlantic fares through their governments, the Civil Aviation Authority, CAB and other agencies. In late December 1981, under pressure from foreign governments, United States airlines were again permitted to join IATA.<sup>98</sup> A rate structure set by the Association that gave the airlines some leeway to set fares within fixed guidelines was approved in 1982 by European governments and the Reagan Administration.<sup>99</sup>

The plaintiff in *Laker* alleges that its competitors conspired to agree to fares outside the IATA meetings, thereby triggering the application of United States antitrust laws.<sup>100</sup> British government officials, on the other hand, argue that under the Bermuda bilateral agreements between Britain and the United States,<sup>101</sup> both governments must ratify

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94. See, e.g., Agreement Governing Air Transport Services, Aug. 15, 1939, United States-France, 53 Stat. 2422, E.A.S. No. 153; Civil Air Transport Agreement, Aug. 11, 1952, United States-Japan, 4 U.S.T. 1948, T.I.A.S. No. 2854; Agreement Relating to Air Services, Feb. 11, 1946, United States-United Kingdom, 60 Stat. 1499, T.I.A.S. No. 1507.

95. See *Effects of Airline Deregulation; and Legislation to Advance the Date for Sunset of the Civil Aeronautics Board: Hearings on H.R. 4065 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 97th Cong., 1st Sess. 258, 260 (1982) (statement of Knut Hammarskjöld, Director General of IATA). IATA was formed by the International Air Transport Operators Conference at Havana, Cuba on April 16-19, 1945. See J. Brancker, *IATA and What it Does* 10 (1977).

96. 49 U.S.C. § 1384 (1976 & Supp. V 1981) exempts from the antitrust laws any agreement approved by the Civil Aeronautics Board (CAB). The CAB routinely approved all IATA rate agreements. See N. Taneja, *U.S. International Aviation Policy* 94 (1980).

97. C.A.B. Order No. 80-4-113 (Apr. 15, 1980).

98. See *A Review of U.S. International Aviation Policy: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation*, 97th Cong., 1st & 2d Sess. 872 (1983) (statement of Knut Hammarskjöld, Director General of IATA); *id.* at 1205-06 (statement of Chairman Elliot H. Levitas); *id.* at 1206-07 (statement of Darrel M. Trent, Deputy Secretary of Transportation).

99. C.A.B. Order No. 83-5-41 (May 5, 1983).

100. See *Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124, 1126-27 (1983).

101. See Agreement Relating to Air Services, Feb. 11, 1946, United States-United Kingdom, 60 Stat. 1499, T.I.A.S. No. 1507.

fares proposed by their airlines over the Atlantic.<sup>102</sup> The British take the position that any fares charged were the result of government policy and that disputes about them should be settled by bilateral negotiation, not in the courts.<sup>103</sup>

Regardless of how the *Laker* case is ultimately resolved, it is clear that important national economic considerations are at stake. What remains unclear is how our institutions—our litigation procedures, courts and executive branch—will respond to the challenge presented by the reaction of our closest allies.

#### IV. SOME POSSIBLE SOLUTIONS

An effort must be made to seek a consensus, both as to the substance of competition law in its manifold forms and to the procedure for resolution of disputes between nations when they arise. The *Timberlane* balancing test, while it may offer the most fruitful path toward progress, is not always observed by courts, nor is it necessarily predictable for litigants or those who must counsel clients. A number of refinements in the *Timberlane* approach, therefore, are in order. First, the balancing “rule of reason” should be regarded as a rule of jurisdiction rather than as a rule of international comity.<sup>104</sup> This would require courts to apply the balancing test at the outset, in a manner appropriate for interlocutory appellate review.<sup>105</sup> Second, there may well be cases that should not be heard by United States courts, even though United States antitrust jurisdiction would be entirely appropriate under a balancing test. The prosecution of some cases in United States courts would cause substantial harm to foreign relations or even to United States national security. Thus, at the outset of the balancing, there ought to be a special trigger factor that would override all other considerations and permit a court to abstain from judgment, regardless of the probable outcome of the jurisdictional balancing test.<sup>106</sup> Third, for those cases not directly related to foreign

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102. See *British Airways Bd. v. Laker Airways Ltd.*, [1983] 3 W.L.R. 544, 553-54 (C.A. 1983).

103. *Id.* at 581-82.

104. The Restatement (Revised) of Foreign Relations Law of the United States § 403 (Tent. Draft No. 2, 1981) adopts this approach.

105. Interlocutory review would be appropriate under 28 U.S.C. § 1292(b) (1976), because a decision regarding the extraterritorial application of American antitrust laws “involves a controlling question of law as to which there is substantial ground for difference of opinion.” *Id.* Furthermore, interlocutory appeal from a finding of jurisdiction may “materially advance the ultimate termination of the litigation.” *Id.*

106. See Shenefield, *U.S. Antitrust In the International Arena—The Problem and Some Solutions*, 15 *Revue Suisse de Droit International de la Concurrence* 3, 23 (1982).

policy and national security concerns, the Justice Department should develop "comity analysis guidelines" to assist the courts in determining the weight to be given to the various *Timberlane* factors.<sup>107</sup> Not only would the guidelines assist the courts, but they would be informative and reassuring to foreign governments. They would also make any involvement in private litigation by the executive branch less necessary.

The *Timberlane* analysis is not the only mechanism for resolving conflicting national claims, but the availability of others may depend upon the precise nature of the antitrust litigation in question. In the case of government-initiated litigation, the exercise of prosecutorial discretion is an essential means for considering foreign interests. In recent years, these considerations have played an important role in final decision-making in the Antitrust Division—there should be no reluctance to state that on the record.<sup>108</sup>

A further step that could be taken within the executive branch is to put into regulation form the informal consultative procedures pursuant to which the Justice Department advises the State Department before it undertakes any enforcement activity with respect to foreign firms or with implications for foreign relations.<sup>109</sup> Formal regulations, requiring that foreign governments be given advance notice and an opportunity to state their views in an appropriate manner about any proposed litigation that may affect their citizens or their firms, would be particularly reassuring to those governments. A prosecution that results in political controversy seems all the more inflexible and harsh if it comes as a surprise and without an adequate opportunity to understand the facts and communicate official views in advance.

In the case of treble damage suits filed by private parties, of course, the United States government is required to play a role that is considerably more circumspect. Government involvement in private disputes is controversial and generally discouraged. There may be circumstances, however, in which United States government representatives should make their views known to the court despite the government's lack of standing as an actual party to the litigation.<sup>110</sup> Private treble damage suits that raise foreign relations con-

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107. Comity analysis guidelines similar in purpose to the Department of Justice Merger Guidelines, reprinted in 1 Trade Reg. Rep. (CCH) ¶¶ 4501-05 (Aug. 9, 1982), could be promulgated as the authoritative United States government view. With such guidelines, United States courts would be prepared to balance contending interests and assess the foreign relations issues in each case. See *Cira*, *supra* note 63, at 260-63.

108. Shenefield, *Extraterritorial Application of United States Antitrust Laws: Economic Imperialism or Correcting Evil at the Source*, *Wirtschaft & Recht*, Jg. 35, Heft 2/3 116, 126 (1983).

109. See *supra* note 4 and accompanying text.

110. See Remarks by John H. Shenefield, *supra* note 1, at 20; Remarks by William French Smith, *supra* note 2, at 15.

cerns should be monitored, and the views of the United States government on comity issues presented, whether by way of informal suggestion, statement of interest, or amicus brief.

Friction resulting from the issuance of United States discovery orders must also be diminished. Once such an order is issued, neither United States nor international law excuses a failure to comply with it on the ground that a conflicting blocking statute exists.<sup>111</sup> When faced with defiance of such an order, a United States court has no alternative but to engage in factual presumptions to move the fact-finding process forward, to enter a default judgment, or to resort to its contempt power to compel compliance.<sup>112</sup> There is room under United States law as it currently exists, however, for United States courts to consider the relative importance of American and foreign interests when issuing an extraterritorial discovery order.<sup>113</sup> Other less intrusive measures for a court to consider include: postponing foreign discovery until it is clear that evidence from domestic sources is inadequate; inspecting foreign records abroad, rather than requiring their transmission to the United States; and appointing an independent expert to prepare an abstract report on foreign records.

All of these conciliatory proposals, however, will produce scant results if they are not matched by similar concessions from foreign governments, which must refrain from too hastily invoking their blocking statutes to frustrate legitimate United States enforcement actions. Above all, it would be unfortunate if these recently enacted foreign statutes were used to construct a haven in which United States individuals or corporations could evade legitimate United States restrictions on illegal and anticompetitive conduct. Increased coordination among United States and foreign antitrust enforcement authorities is required.

By exchanging information, planning and conducting joint investigations, and reaching some agreement on allocation of resources to emphasize particular spheres of enforcement activity, it is possible to enhance the efficiency of antitrust enforcement worldwide. United States antitrust authorities should cede responsibility in certain circumstances involving foreign conduct to other antitrust authorities who would examine the same situation for prosecution under foreign antitrust law. There is no doubt that there would have been far less

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111. See *United States v. First Nat'l City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968); *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 294-95, 308 (S.D. Cal. 1981).

112. See *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099 (1982); Fed. R. Civ. P. 37(b)(2).

113. See *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 997 (10th Cir. 1977); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 341 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).



reason to launch widespread United States prosecutions in connection with the *Uranium* case if it had been known to the United States government at the time that the Canadian government was seriously considering criminal prosecution of Canadian companies. Although there are major barriers to totally candid exchanges of information on enforcement issues between countries, it is fair to ask whether the interests protected by existing policies are always more important than avoiding the kind of international controversy that has arisen in recent years over extraterritorial antitrust application.

Perhaps the most important contribution to improving the climate for United States antitrust enforcement extraterritorially would be legislative reform of the treble damage remedy as it affects United States foreign commerce. One such provision, restricting recovery to single damages, is already incorporated in the ETC Act.<sup>114</sup> Its effect will be minimal, however, as long as other statutes relating to foreign commerce that permit treble damage recoveries remain on the books. Legislation now before Congress that would eliminate treble damages in rule of reason cases<sup>115</sup> would solve part of the problem. The best possible way to moderate the treble damage feature with respect to foreign defendants in appropriate cases, however, would be to give either the Attorney General or the trial court discretion to limit recoveries to single damages. The Attorney General would be preferable on the one hand because he has access to the best possible information on the likely impact of the litigation on foreign relations, whereas a court would be required to get its information less directly. The court, however, would be immune from the kind of pressure litigants, including foreign governments, would attempt to exert. It might be best, therefore, to allow the Attorney General to make a recommendation to limit damages in the appropriate case while retaining discretion in the trial court to make the final determination.

Finally, a multinational committee of experts, including practitioners, scholars, public servants and economists, should begin a regular series of informed and confidential conversations. The effort would be to see how far the controversy recedes in the face of dispassionate analysis designed to avoid posturing while addressing practical realities in an abstract context unrelated to any particular case or international political controversy. Such a group could, over time, make progress on such questions as discovery procedures in transborder

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114. 15 U.S.C. § 4016(b)(1) (1982).

115. S. 1841, 98th Cong., 1st Sess. (1983), introduced by Senator Thurmond at the request of the Administration, and S. 1561, 98th Cong., 1st Sess. (1983), the National Joint Research and Development Policy Act, introduced by Senator Dole, would limit recovery in litigation arising from research and development joint ventures to single damages.

litigation, clearance procedures by one government of the export policies of another (at least insofar as an effect on competition might be anticipated), procedures for sharing discovery, and doctrines of international primary jurisdiction. Once a consensus is reached, government policies might be influenced and revised, and the law, if necessary, amended.

The United States is not going to forego antitrust enforcement altogether, nor should it. Nor are we going to change our views on extraterritorial application so fundamentally that foreign firms or conduct will always be beyond reach of United States law. What our foreign friends and our businesses do have a right to ask is that we take moderate steps that do not sacrifice important principles but do serve to improve the prospects for harmony among our allies in a complex international world.